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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES

JEFF ROYAL - PETITIONER
VS.
TOM REID - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should Jeff Royal's claim for compensatory damages have been barred by the Prison Litigation Reform Act because he did not show physical injury where his claim was based on the First Amendment to the United States Constitution and where the damages suffered indisputably involve being locked up in solitary confinement for approximately sixty (60) days?

2. Is the Prison Litigation Reform Act limitation on attorney fees to 150% of the damage award unconstitutional particularly in a case such as this one where the only relief available was nominal damages?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

I. OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix at page 30a attached to the petition and is

[x] reported at Royal v. Kautzky, 375 F.3d 720 (8th Cir 2004);

The opinions of the United States District Court appear at Appendix 1a, 12a, and 27a and are attached to the petition and are unpublished.

II. JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 15, 2004.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 15, 2004, and a copy of the order denying rehearing appears at Appendix 55a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, Section I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1997e(e).

Limitation on recovery. No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

42 U.S.C. § 1997e(d)(2)

Whenever a monetary judgment is awarded in an action described in paragraph 1, a portion of the judgment (not to exceed 25%) shall be applied to satisfy the amount of attorney fees awarded against the Defendant. If the award of attorney fees is not greater than 150% of the judgment, the excess shall be paid by the Defendants.

IV. STATEMENT OF THE CASE

This is an appeal from a civil rights case brought by an inmate in the Iowa Department of Corrections system, Jeff Royal. Mr. Royal came into the prison system in the fall of 1998 and immediately encountered problems concerning his health. In response he engaged in certain protected activities, including filing the first pleading in this lawsuit. Mr. Royal also filed various administrative appeals and grievances. At some point, the Security Director at Iowa Medical Classification Center, Tom Reid, got tired of the complaints from Mr. Royal and had him locked up in solitary confinement. Mr. Royal remained in that status for about two (2) months. An amended and substituted civil rights complaint was then filed, complaining solely about the fact that Mr. Royal was locked up in retaliation for a protected activity.

The case eventually proceeded to trial to Magistrate Judge Ross Walters. Judge Walters found in Mr. Royal's favor, concluding that as a factual matter Mr. Royal had been locked up for almost two months because of the fact that he engaged in the protected activity of lodging various complaints about his conditions. Judge Walters, however, found that because of certain limitations under the PLRA damages would be limited to one (1) dollar in nominal damages. Appx. pp. 24a-25a. This repeated a ruling the judge had made earlier in ruling on the Motion for Summary Judgment. Appx. pp. 5a-8a. The court went on in its final ruling to deny the claim for punitive damages. Appx. pp. 25a-26a. Attorney fees were then fixed, over the constitutional objection of Mr. Royal, at 150% of the

$1.00. Appx. p. 28a. Mr. Royal appealed.

On July 15, 2004 the Eighth Circuit Court of Appeals entered its Ruling denying Mr. Royal's appeal. Royal v. Kautzky, 375 F.3d 720 (8th Cir. 2004). Appx. 30a Mr. Royal filed a timely request for rehearing *en banc*. That request was finally denied by the court on October 15, 2004. Three (3) judges would have granted rehearing. Appx. 55a

V. REASONS FOR GRANTING THE PETITION

A. MR. ROYAL'S CLAIMS FOR COMPENSATORY DAMAGES SHOULD NOT HAVE BEEN BARRED BY THE PRISON LITIGATION REFORM ACT.

Jeff Royal claimed, and as a factual matter, the Magistrate agreed, that he had been locked up in solitary confinement at the Oakdale prison in direct retaliation for engaging in protected activity. He sought damages for the time in lockup, which was about sixty (60) days. If it were not for the Prison Litigation Reform Act, this kind of damage would be clearly compensable. See Trobaugh v. Hall, 176 F.3d 1087 (8th Cir. 1999). Indeed there is a history of Eighth Circuit cases awarding compensatory damages for periods of time being locked up in retaliation for engaging in protected activity. See Goff v. Burton, 91 F.3d 1188 (8th Cir. 1996); Cornell v. Woods, 69 F.3d 1383 (8th Cir. 1995); Goff v. Burton, 7 F.3d 734, 738 (8th Cir. 1993). Based on the Trobaugh case Mr. Royal might have received damages of close to $6,000 (60 days

times $100/day).

The lower courts, however, decided that compensatory damages for time spent in lockup were not available because of the PLRA provision limiting recovery for "mental or emotional injury". Appx. pp. 5a-8a, 36a-37a;

The particular language of the Prison Litigation Reform Act says

> Limitation on recovery. No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury. 42 U.S.C. § 1997e(e).

The lower courts decided that an action based on the First Amendment, alleging retaliation for protected activity, seeking damages for the period of time spent in lockup, was subject to the limitation imposed by that section. They found that damages for being wrongfully locked up also fell within the limitation.

This Court should grant *certiorari* and reach a different result. For several reasons the Court should conclude that compensatory damages should have been available to Mr. Royal for the time spent in lockup.

As an initial matter it should be recognized that virtually all of the Circuits now agree with the portion of the Eighth Circuit decision recognizing that a prisoner with no physical injuries can still bring a lawsuit for nominal and punitive

damages and for injunctive relief. Thompson v. Carter, 284 F.3d 411 (2nd Cir. 2002); Allah v. Al-Hafeez, 226 F.3d 247 (3rd Cir. 2000); Cassidy v. Indiana Dept. of Corrections, 199 F.3d 374, 376 (7th Cir. 2000); Oliver v. Keller, 289 F.3d 623 (9th Cir. 2002); Searles v. Van Bebber, 251 F.2d 869 (10th Cir. 2001) *cert. denied* 536 U.S. 904, 122 S.Ct. 2356, 153 L.Ed.2d 179 (2002); See also Davis v. District of Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998) (case says injunctive and declaratory claims survive, but not punitive damages). This position is important as an initial matter because it means that the language "no federal civil action may be brought" does not really mean that. Prisoners who do not have physical injuries can still sue in any kind of case and that case will go forward for some kind of relief.

This also means that the statute must be, as it says in the introduction, a "limitation on recovery." Put another way, the statute must only be a limitation on the recovery of certain damages when there is no physical injury.

The lower court rulings in this case , however, apparently impose the requirement of a physical injury on any kind of compensatory damages. This has the effect of actually substituting the word "any" for the words "mental or emotional" as describing injuries.

In fact a much more plausible reading of the statute is that it eliminates the ability to recover one and only one type of compensatory damage if there is no physical injury. That type of damage is damage for mental or emotional damages. It follows that other types of compensatory damages are available even if there is no physical injury.

There are two ways to reach this conclusion.

The limitation on damages in 1997e(e) should not apply to First Amendment Claims.

First, this Court could follow the lead of Judge Heaney in dissent in this case or of Judge Laughrey from the Western District Court in Missouri in his published decision in Mason v. Schriro, 45 F.Supp.2d 709, 717 (W. D. Mo 1999). Judge Laughrey held that the PLRA limitation only applied to violation of constitutional rights where the infliction of mental or emotional injury was itself the violation of the right. He, therefore, concluded that a constitutional claim that had little to do with mental or emotional injury was not limited by the provision at all. Therefore, the limitation would not apply to a First Amendment Free-Exercise claim, a Fourteenth Amendment Equal Protection claim, or a Fourteenth Amendment Due Process claim. 45 F.Supp.2d at 720. In none of those types of cases would a Plaintiff be required to make any showing of mental or emotional harm in order to state a claim. Judge Laughrey essentially recognized that the statutory provision about physical injury was primarily directed at Eighth Amendment claims, which is in fact where most of the litigation involving this provision is found.

The Ninth Circuit has agreed with Judge Laughrey. In Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) the Ninth Circuit found the provision inapplicable to First Amendment claims. In Rowe v. Shake, 196 F.3d 778 (1999) the Seventh Circuit said that "deprivation of First Amendment rights standing alone is a cognizable injury" and that " a

prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental or emotional injury he may have sustained." See also Lipton v. McGinnis, 315 F.Supp.2d 434, 457 (S.D.N.Y 2004) ("there is an exception to the aforementioned PLRA preclusion of compensatory damages in the absence of physical injury where the constitutional right that is allegedly violated arises under the First Amendment.")

For cases disagreeing with Canell and applying the damage limitation to First Amendment prisoner cases see Allah v. Al-Hafeez, 226 F.3d 247 (3rd. Cir 2000) (free exercise case); Searles v. Van Bebber, 251 F.2d 869 (10th Cir. 2001) *cert denied* 536 U.S. 904, 122 S.Ct. 2356, 153 L.Ed.2d 179 (2002) (free exercise case); Harris v. Garner, 216 F.3d 970 (*en banc*) (11th Cir. 2000) *cert. denied* 532 U.S. 1065 121 S.Ct. 2214 150 L.Ed.2d 208 (2001). (The court said 1997e(e) applied to all "constitutional" claims - the actual claims brought were apparently Fourth Amendment claims.)

If the Court accepts Judge Heaney's reasoning, the limitation would not apply to a retaliation case at all.

Damages for being locked up should be excluded from 1997e(e).

A second argument for allowing compensation for lockup damages focuses on the fact that injury for being improperly locked up is not a "mental or emotional injury" restricted by the statute.

The starting point for this argument is that the limitation

found in 1997e(e) is a limitation on the type of damage that can be recovered. A prisoner cannot recover for emotional injuries absent a physical injury. But there are many types of damages that are compensable under the civil rights statute, 42 U.S.C. § 1983. Violation of constitutional rights "may include not only out-of-pocket loss and other monetary harms, but also such injuries as the impairment of reputation...personal humiliation, and mental anguish and suffering." Memphis Community School District v. Stachura, 477 U.S. 199, 307, 91 L.Ed.2d 249, 106 S.Ct. 2537 (1986) (quoting Gertz v. Robert Welsch, Inc., 418 U.S. 323, 350, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974)).

A few cases have looked at 1997e(e) and specifically addressed other kinds of compensable injuries that could be recovered by prisoner plaintiffs. In Thompson v. Carter, 284 F.3d 411, 418 (2nd Cir. 2002), the court addressed a *pro se* complaint by a prisoner that alleged, among other things, that the prison had taken his medication without giving him a contraband slip. The court discussed the kind of damages that could be available, even given the restriction of 1997e(e). First of all, the court agreed with several other circuits that nominal and punitive damages could be pursued and were not barred by the statute. The court then had this to say:

We also do not perceive any basis in Section 1997e(e) for barring an award of compensatory damages for the loss of Thompson's property, provided he can establish actual injury. 284 F.3d at 419.

For other cases allowing compensatory damages despite

1997e(e) see Hughes v. Lott, 350 F.3d 1157 (11th Cir. 2003) (allowing deprivation of property claim under the Fourteenth Amendment to forward); Robinson v. Page, 170 F.3d 747 (7th Cir.1999) (stating in dicta that 1997e(e) has no application to a constitutional claim for lost property); Ford v. McGinnis, 198 F.Supp.2d 363, 366 (S.D.N.Y. 2001) (rejects argument that First Amendment is outside of 1997e(e) entirely and recognizes that one can recover compensation for "denial of religious meal".The court apparently would tell the jury that it should not take into account any emotional or mental injury.)

In Cassidy v. Indiana Department of Corrections, 199 F.3d 374, 375-6 (7th. Cir 2000) the Seventh Circuit allowed claims for compensatory damages for things other than emotional injury to go forward, including the opportunity to obtain early release and the diminished quality of life. In Lipton v. County of Orange, 315 F.Supp.2d 434 (S.D.N.Y. 2004) the District Court allowed a claim for compensable damages for the value of the transfer of the Plaintiff to the Riker's prison in retaliation for his lawsuits.

Jeff Royal believes that damages from being locked up, whether it is in disciplinary detention or administrative segregation or being even in prison itself, are compensable damage aside from how much the situation bothered the person or whatever kind of emotional injury may have accompanied it. In Trobaugh v. Hall, 176 F.3d 1087 (8th Cir. 1999), the Eighth Circuit recognized this kind of injury even though the PLRA issue was not discussed. Compensation was appropriate to Mr. Trobaugh for the days he was in segregation apart from any emotional and mental injury that the lockup cost him. For other non PLRA cases discussing damages for being placed in

solitary confinement or other forms of segregation, see Simmons v. Cook, 154 F.3d 805, 809 (8th Cir. 1998); Maxwell v. Mason, 668 F.2d 361, 365-66 (8th Cir. 1981).

To some extent, these cases are a reflection of the type of damage recognized by Judge Posner over fifteen (15) years ago in Ustrak v. Fairman, 781 F.2d 573 (7th Cir.), *cert. denied* 479 U.S. 824, 107 S.Ct. 95, 93 L.Ed.2d 47 (1986). In Ustrak, a case which involved a prisoner wrongfully transferred to a higher security prison, the Court held that "the loss of amenities within prison is a recoverable item of damage." This type of damage is provable by testimony concerning differences in physical condition, daily routine, etc.; the court did not mention mental or emotional injury as part of that analysis. 781 F.2d at 578.

It is settled law that compensatory damages under § 1983 are governed by general tort-law compensation theory. See Carey v. Piphus, 435 U.S. 247, 255, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). In other words, "damages are available under [§ 1983] for actions 'found ... to have been violative of ... constitutional rights and to have caused compensable injury....' "Id. (emphasis omitted) (quoting Wood v. Strickland, 420 U.S. 308, 319, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975)). In order to conclude that damages for being locked up in solitary confinement are a compensable injury under the Prison Litigation Reform Act it is helpful to again look at that common law.

The leading nineteenth-century damages treatise divided damages into six "classes": "injuries to property"; "physical injuries"; "mental injuries"; "injuries to family relations"; "injuries to personal liberty"; and "injuries to reputation."

Arthur G. Sedgwick & Joseph H. Beale, Jr., 1 Sedgwick's Treatise on Damages, 50-51 (8th ed. 1891). Congress in 1997e(e) did nothing more than limit one of these types of damages. All other types of damages are still available.

Under the common law of false imprisonment, courts allow juries to award substantial, not merely nominal, damages to plaintiffs who offer no proof of either battery, physical injury, or mental or emotional distress. Just as compensation is allowed in defamation cases for reputational injury wholly apart from mental or emotional injury, compensation in false imprisonment cases is allowed for the conceptually separate category of "loss of liberty" damage. See Sedgwick on Damages, supra at 70-71. ("For an illegal restraint of the plaintiff's personal liberty compensation may be recovered. This is something different from either the loss of time or the physical injury or mental suffering caused by the imprisonment."); Charles T. McCormick, Handbook on the Law of Damages, 375 (1935) ... ("though only the wrongful detention be pleaded, without any specification of injurious results, the plaintiff can recover for any harm of a sort usually inseparable from such restraint as "general" damages"). See also Nelson v. Winnebago Industries, Inc., 619 N.W.2d 385, 388 (Iowa 2000) (approvingly citing and discussing cases that hold that "the gist of an action for false imprisonment is unlawful detention irrespective of any physical or mental harm").

Mr. Royal's case fits into this common law tradition of false imprisonment. The damages he seeks are not for his emotional distress but for his loss of liberty that occurred when he was placed in confinement. Because Mr. Royal's action is

not one "for mental or emotional injury" under the accepted meaning of that phrase, the PLRA's physical injury provision does not bar recovery.

This reading of § 1997e(e) not only gives full effect to the statute's text, it also is consistent with the evident congressional intent, which was to ensure that only claims with some external indicia of reliability and seriousness can proceed. The statute essentially codifies a version of the common law "physical impact" rule, under which plaintiffs in negligence actions may recover for emotional distress only if that distress accompanied the negligent infliction of a physical impact. See, e.g., Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 546, 547 114 S.Ct. 2396 129 L.Ed.2d 427 (1994), Metro-North Commuter R. Co. v. Buckley, 521 U.S. 424, 430, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997) (allowing recovery only if the impact "caused, or might have caused, immediate traumatic harm"); Lee v. State Farm Mutual Insurance Co., 272 Ga. 583, 533 S.E.2d 82, 84 (2000) ("In a claim concerning negligent conduct, a recovery for emotional distress is allowed only where there is some impact on the plaintiff, and that impact must be a physical injury."). In a leading article on the subject of the impact rule, Francis Bohlen (the reporter for the first Restatement of Torts) explained its purpose: First, he wrote, common law lawmakers deemed "mental suffering comparatively trivial in the great majority of cases." Second was the "difficulty of proof" of purely nonphysical harms, which rendered compensation unduly speculative. Third, such harms were thought to be "too remote." Fourth, judges thought that altering the impact rule "would . . . encourage litigation," particularly because the relevant evidence was "easy to

fabricate, hard to controvert." Francis H. Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 Am. L. Reg. 141, 142, 143, 146 (1902). A number of courts applying § 1997e(e) have recognized that its passage was prompted by very similar concerns. See, e.g., Dawes v. Walker, 239 F.3d 489, 496 (2nd Cir. 2001) (in structuring § 1997e(e) to preclude prisoners from "recovery" "for mental and emotional injury suffered while in custody without a prior showing of physical injury," Congress looked to the common law of torts) (Walker, J., concurring); Zehner v. Trigg, 952 F.Supp. 1318, 1325 (S.D.Ind.)aff'd, 133 F.3d 459 (7th Cir. 1997);. ("[B]y enacting § 1997e(e), Congress took a page from the common law by limiting claims for mental and emotional injuries, which can easily be feigned or exaggerated, in the absence of physical injury.").

The approach, adopted by the Eighth Circuit in this case, fails to follow the statutory language or purpose. Instead of acknowledging that § 1997e(e)'s limitation on recovery applies only to claims for "mental or emotional injur[ies]," the court read the statute to bar inmate recovery for *all* non-nominal (and non-punitive) damages without accompanying physical injury. To bring the Circuit's approach in line with the statutory text would require substituting the word "any" for the word "mental or emotional." The Circuit approach bars any claim for damages absent physical injury. The Eighth Circuit should not rewrite the statute, but should rather give effect to the actual boundaries Congress intended.

B. THE PLRA LIMITATION ON ATTORNEY FEES TO 150% OF THE DAMAGES AWARDED IS UNCONSTITUTIONAL, PARTICULARLY WHERE ONLY NOMINAL DAMAGES ARE AVAILABLE.

After the district court entered judgment in favor of Mr. Royal for $1.00, Mr. Royal's counsel submitted a request for attorney fees. The district court, relying on Section 1997e(d)(2) in the Prison Litigation Reform Act, limited the attorney fees to $1.50. That section specifically provides the following:

> Whenever a monetary judgment is awarded in an action described in paragraph 1, a portion of the judgment (not to exceed 25%) shall be applied to satisfy the amount of attorney fees awarded against the Defendant. If the award of attorney fees is not greater than 150% of the judgment, the excess shall be paid by the Defendants.

Essentially this somewhat inartfully drafted portion of the PLRA caps attorney fees in damage actions at 150% of the amount awarded to the Plaintiff. In this case, the court awarded the nominal damage of $1 to Mr. Royal. Attorney fees were therefore capped at $1.50. Mr. Royal challenges the statute as applied in this case as unconstitutional.

A panel of the 8th Circuit had addressed the constitutionality of 1997e(d)(2) several years ago. Foulk v. Cherrier, 262 F.3d 687 (8th Cir. 2001) found that the PLRA cap

on fees did not violate equal protection, even in the context of an award of only nominal damages. In the Royal case before the Eighth Circuit the panel was bound by and followed the Foulk decision.

Jeff Royal asserts that the limitation of fees in this case is unconstitutional, in violation of the Equal Protection Clause found in the Fourteenth Amendments to the United States Constitution.

As a threshold matter, it is necessary to identify the different groups that are not receiving equal treatment. Mr. Royal is a person who was in prison and was successful in establishing that his constitutional rights were violated. People who are not in prison, who are successful in establishing that their constitutional rights were violated under 42 U.S.C. 1983, and who receive nominal damages are not limited in their attorney fees by any fee cap.[1] Because of qualified immunity persons in these groups only get damages when state actors violate an established right. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Therefore the group Mr. Royal belongs to for constitutional analysis is prisoners who are successful in establishing that their constitutional rights were violated where those rights are "established".

Classifications singling out prisoners apparently are analyzed using the rational basis test. Johnson v. Daley, 339

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[1] Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) does provide a limit on the ability to recover fees under 42 U.S.C. 1988 when only nominal damages have been recovered.

F.3d 582, 586, 610 (7th Cir. 2003) *cert. denied* ___ U.S. ___, 124 S.Ct. 1654 158 L.Ed.2d 354 (2004). While that test is not without substance the other circuits that have examined the constitutionality of attorney fee caps under the PLRA have all found the provisions constitutional. Boivin v. Black, 225 F.3d 36 (1st Cir. 2000); Walker v. Bain, 257 F.3d 660 (6th Cir. 2001) (2-1 vote) *cert. denied* 535 U.S. 1095, 122 S.Ct. 2291, 152 L.Ed.2d 1050, (2002); Johnson v. Daley, 339 F.3d 582 (7th. Cir 2003) (7-4 vote) *cert. denied* ___ U.S. __, 124 S.Ct. 1654, 158 L.Ed.2d 354 (2004); Madrid v. Gomez, 1901 F.3d 990 (9th Cir. 1999); Jackson v. Board of Pardons and Paroles, 331 F.3d 790 (11th Cir. 2003) *cert. denied* 540 U.S. 880, 124 S.Ct. 319, 157 L.Ed.2d 145 (2003); See also Collins v. Montgomery County, 176 F.3d 679, 686 (3rd Cir. 1999) (affirmed by equally divided Court) *cert denied* 528 U.S. 1115, 120 S.Ct. 932, 145 L.Ed.2d 811 (2000).

This unanimity has not been without dissent. In the Collins case the court split evenly on the constitutionality of the statue. In the Johnson case there were four (4) votes against the statute. There was a dissent in the Walker case. In the Foulk case the court cited with apparent approval a portion of the majority decision in the Walker case, acknowledging being troubled by the statute.

The line of cases favoring constitutionality of the fee cap is not as solid as it appears. First, as has been mentioned, the authority is not without dissent. Second, the cases from the Ninth and Eleventh Circuits were injunction cases challenging only the hourly rate provision. The result of the PLRA cap in this case is much more severe than the cap on hourly rates. The cases from the Third and Seventh Circuits involved jury

verdicts of $30,000 and $40,000 respectively. Consequently 150% of those figures was not the severe limitation as in this case. Foulk and Boivin, the cases from the Eighth Circuit and First Circuits respectively, involved nominal damages where the juries awarded $1 but could have awarded more. In those cases even without the fee cap the jury awards might have been reduced or disallowed under Farrar.

As was previously mentioned the rational basis test is not without substance. See Romer v. Evans, 517 U.S. 620, 632-33, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (to survive rational relation scrutiny, law must be grounded in sufficient factual context for court to ascertain some relation between the classification and the purpose it serves); Keller v. Doe, 509 U.S. 312, 321, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation); Burlington Northern R Co. v. Ford, 504 U.S. 648, 653, 112 S.Ct. 2184, 119 L.Ed.2d 432 (1992) (recognizing that equal protection clause is violated if the under inclusiveness and over inclusiveness is so great that the rules can no longer be said rationally to implement the policy judgment).

There are usually two (2) reasons advanced for the limitation on fees. First, the limitation on fees is rational as part of an overall effort of the PLRA to curb frivolous litigation. Second, there is an interest in reducing the cost imposed on the government in connection with these civil rights cases. Neither of these claims should be accepted even under the rational basis standard.

There should be no rationality accepted whatsoever with regard to any concern for frivolous litigation. The fee cap is a limitation on successful prisoners. The fee cap is a limitation on people who, by definition, have established that their case has merit. Indeed as it is a limitation on fees when damages have been awarded it is likely that damages were only awarded where qualified immunity has not applied. Consequently these are prisoners who have proven that their "established rights" have been violated.

A detailed examination of rationality of the fee limit appears in the dissent filed by Judge Rovner in Johnson v. Daley, 339 F.3d 582, 600 (7th Cir. 2003) *cert. denied* ____ U.S. ___ 124 S.Ct. 1654, 158 L.Ed.2d 354 (2004). As an initial matter the dissenting opinion stated the following:

> The journey from the PLRA fee restrictions to the reduction in trivial or frivolous filings, however, requires so many leaps, many ridiculous, as to destroy any semblance of rationality. 339 F.3d 582 at 600.

Judge Rovner then proceeded to look at every conceivable argument for how this limitation on fees could advance the cause of limiting frivolous prisoner cases. She noted that attorney fees were never available for frivolous cases and in fact that sanctions may be imposed against the frivolous filers. 339 F. 3d at 612. She then looked at the role the fee limitation would play in limiting marginal or trivial lawsuits. As to these cases she noted that in most cases the statute did

nothing that was not already there under Section 1988.

> Only where other factors establish that a seemingly minimal victory was actually significant, as where it involves a significant legal issue and serves an important public interest, will fees be available for a case that would otherwise be considered trivial or de minimis. (Citation omitted) The Government does not argue, nor could it, that it has a legitimate interest in discouraging the filing of constitutional claims involving a significant public interest. 339 F.3d at 614.

Some of these same observations were made in Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972). In Lindsey the court decided that the double bond provision of the Oregon forcible entry and detainer statute was unconstitutional. That statute had required tenants appealing an adverse determination to post twice the bond as the amount of rent expected to accrue during the appellant decision. The purpose of the statute was to discourage frivolous appeals. The Supreme Court found the statute deficient because it was over and under inclusive and also because pre-existing statutes protected the asserted state interest.

This reasoning applies to analysis of the fee cap in this case. Any governmental interest in curtailing frivolous litigation is amply protected not only by other provisions in the PLRA but also by other limitations on the award of attorney fees in

successful civil rights litigation. This one particular portion of the PLRA cannot be supported by any government interest in curbing frivolous litigation.

What about saving money? The cap certainly does save government money. Any limit on money that government has to pay saves money by definition. In this case the statute saves the government money when the government has violated constitutional rights that are clearly established. This reason should not be accepted even under rational basis scrutiny.

It also should be clear that the money supposedly being saved by 1997e(d)(2) is already subject to reduction in a number of other ways. First of all, the hourly rate that lawyers for prisoners can receive is subject to a separate fee cap under the PLRA that is not challenged herein. Second, the courts have already limited attorney fees in those cases where success is limited. If a verdict is obtained in a particular case for only a small amount of money, the defendants can argue aside from the PLRA that attorney fees should be reduced because of limited success. Indeed if only nominal damages are obtained fees may not even be allowed. See Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). There essentially is already a substantial judicial curb on the amount of attorney fees in cases where small amounts of money are obtained as relief.

These interests are advanced at no little cost. In the Foulk case itself, the Eighth Circuit quoted from the Sixth Circuit decision in Walker v. Bain, 257 F.3d 660, 669-70 (6th Cir. 2001).

> We are aware that 1997e(d)(2) will have a strong chilling effect upon counsel's willingness to represent prisoners who have meritorious claims. We are also mindful that the 'marginal or trivial' claims that result in a judgment for a prisoner, such as (Foulk) do in fact arise out of an actual proven civil rights violation. We admit to being troubled by a federal statute that seeks to reduce the number of meritorious civil rights claims and protect the public fisc at the expense of denying a politically unpopular group their ability to vindicate actual, albeit 'technical' civil rights violations. However, we are aware that we are not authorized to act as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor perceive along suspect lines. Moreover, our role is not to judge the wisdom, fairness or logic of legislative choices. Accordingly, we must conclude that 1997e(d)(2) survives rational review. 262 F.3d at p. 704.

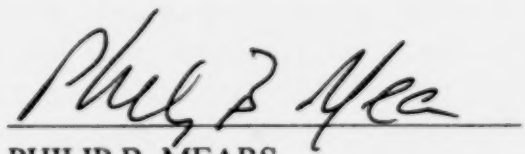
This Court should reject the view that any constitutional violation is "marginal or trivial" or for that matter, even "technical". This is particularly the case where qualified immunity was not available, which is the case anytime damages are found against a state actor. This is particularly the case where and if the prisoner is limited to nominal damages by the physical injury requirement. For the same reasons articulated

by Judge Rovner the Court should reject cost savings as rational. The savings were already there in most cases. The only time the 150% fee cap would matter would be in those cases where there was a great public interest. Particularly in those cases the claims are not trivial.

VI. CONCLUSION

C. Jeff Royal was able to establish that his rights under the First Amendment were violated when the security Director put him in solitary confinement for two months in retaliation for engaging in protected activity. The lower courts required the Security Director to pay $2.50, including attorney fees. That came out to about 4 cents per day for each of the days Mr. Royal wrongfully spent in lockup. There is something wrong with that outcome. The petition for a writ of certiorari should be granted to address the legal conclusions that led to that result.

RESPECTFULLY SUBMITTED,



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ATTORNEY FOR PETITIONER

Dated January 13, 2005

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JEFFERY R. ROYAL,	)	Case No. 4-98-cv-30495
	)	
Plaintiff,	)	RULING ON
	)	DEFENDANTS'
vs.	)	MOTION FOR
	)	SUMMARY
LOWELL BRANDT,	)	JUDGMENT
CAROLE CLEMENS, TOM	)	
REID and CERTAIN	)	
UNNAMED JOHN DOES,	)	
	)	
Defendants.	)	

This matter is before the Court on defendants' second motion for summary judgment (#54). Plaintiff Jeffery R. Royal filed this action on September 30, 1998, asserting claims for relief under 42 U.S.C. § 1983 and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, et seq. As a result of subsequent events, plaintiff dropped the ADA claim and was allowed to file an amended complaint under § 1983, in which he now claims he was retaliated against for exercising his right of access to the courts. Plaintiff seeks compensatory and punitive damages.

Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1343(a)(3), and 1343 (a)(4). The parties consented to proceed

before a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) and the matter was referred to the undersigned on October 11, 2000.

Defendants filed the present motion on August 16, 2000. Plaintiff has resisted. The matter is fully submitted on the motion papers. See LR 7.1(c).

I.

Defendants' motion for summary judgment is subject to the following well-established standards. A party is entitled to summary judgment only when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Helm Financial Corp. v. MNVA Railroad, Inc., 212 F.3d 1076, 1080 (8th Cir. 2000)(citing Fed. R. Civ. P. 56(c)); accord Bailey v. USPS, 208 F.3d 652, 654 (8th Cir. 2000). An issue of material fact is genuine if it has a real basis in the record. Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). A genuine issue of fact is material if it "might affect the outcome of the suit under governing law." Hartnagel, 953 F. 2d at 395 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)); see Rouse v. Benson, 193 F.3d 936, 939 (8th Cir. 1999).

In assessing a motion for summary judgment a court must determine whether a fair-minded trier of fact could reasonably find for the nonmoving party based on the evidence presented. Anderson, 477 U.S. at 248; Herring v. Canada Life Assurance Co., 207 F.3d 1026, 1030 (8th Cir. 2000). The court must view the facts in the light most favorable to the nonmoving party, and give that party the benefit of all

reasonable inferences which can be drawn from them. Matsushita, 475 U.S. at 587; accord Lambert v. City of Dumas, 187 F.3d 931, 934 (8th Cir. 1999); Kopp v. Samaritan Health System, Inc., 13 F.3d 264, 269 (8th Cir. 1993). The court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue meriting a trial. Gremmels v. Tandy Corp., 120 F.3d 103, 105 (8th Cir. 1997)(citing Grossman v. Dillard Dep't Stores, Inc., 47 F.3d 969, 971 (8th Cir. 1995)); Johnson v. Enron Corp., 906 F.2d 1234, 1237 (8th Cir. 1990). A conflict in the evidence ordinarily indicates a question of fact to be resolved by the trier of fact. Scherin Corp. v. Home Ins. Co., 712 F.2d 4, 9 (2d Cir. 1983).

II.

The following facts appear to be undisputed or are those viewed in the light most favorable to plaintiff. Plaintiff Jeffery Royal was received into the custody of the Iowa Department of Corrections on August 10, 1998 and initially was sent to the Iowa Medical and Classification Center (IMCC) at Oakdale, Iowa. He was assigned to the general population. Royal had medical needs arising from a pre-existing spinal cord injury. He had been using a wheelchair at the time he was received into the prison system. By November 1998 he was ambulating using a crutch. Royal complained this caused him pain and sought the return of a wheelchair to get around the facility. A physical therapist at the University of Iowa Hospitals and Clinics (UIHC) had advised that using a wheelchair would be counterproductive. At the time Royal was rejecting opportunities for exercise. Medical staff denied Royal's request for a wheelchair. Royal requested preliminary injunctive relief. A hearing was scheduled, but in the interim, on January 12, 1999, plaintiff was seen by a neurosurgeon at UIHC who

advised against the use of crutches in order to reduce pressure on the ulnar nerve. After receiving this recommendation, prison officials agreed to allow Royal to have a wheelchair. The hearing was canceled.

Shortly afterward, on January 28, 1999, plaintiff received a disciplinary report for being disruptive and abusive with medical staff concerning his plan of care. Although the report did not recommend summary segregation or immediate lockup, defendant Reid, the security director, placed plaintiff in investigative segregation on that date. (Pl. Ex. 4; Def. Ex. D at 8-10). Royal states that through some administrative process, which is not clear in the record, the report was eventually expunged. (Pl. Ex. 2 at 2). In the meantime, plaintiff was removed from general population and a transfer request was initiated by one of the committees which reviewed inmate placement. Which committee directed Royal's removal from general population and which committee initiated the transfer request are disputed facts on this summary judgment record. Defendants were members of the Institutional Classification Committee which reviewed Royal's segregation status periodically and determined whether he should remain in that status. Committee records reflect that Royal was removed from the general population program and was maintained in administrative segregation until his transfer from the institution. (Def. Ex. F). Most individuals who are going to be transferred out of IMCC are not placed in segregation pending transfer. (Pl. Ex. 12 at 5, 8).

Plaintiff's correctional counselor at the time testified one reason for the decision to lock up Royal was his "manipulation" (as the Institutional Review Committee's notes also reflect) and it is fair to infer from his testimony that it was general knowledge among those who dealt with Royal that he

had filed a lawsuit regarding his medical situation. (Pl. Ex. 11 at 16, 21; Pl. Ex. 1). Plaintiff had good work and cellhouse evaluations in December and in January. (Pl. Exs. 5 and 8).

On March 25, 1999, Royal was transferred to the Iowa State Penitentiary Medical Care Unit. He has subsequently been paroled.

III.

A. Physical Injury Requirement of PLRA

Defendants argue first that Royal's retaliation claim is barred because he did not suffer a physical injury, relying on 42 U.S.C. § 1997e(e). This section was enacted as part of the Prison Litigation Reform Act (PLRA) and provides,

> No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury.

Royal's compensatory damages claim appears to be entirely for mental or emotional distress. He testified as follows in his deposition:

> Q. You have also talked about damages in your complaint, and can you tell me what your damages are as a result of the allegations that you are making here?
>
> A. Basically, you know, a

> lot of mental stress, a lot of mental fatigue, a lot of mental harassment. The hole is a very hard place to be in. It's not fun. Damages include, you know, anything from not being allowed to, you know, be with other people to, you know, mental cruelty and the harassment for filing a lawsuit and winning part of it or you guys surrendering part of it.
>
> * * *
>
> Q. ... Can you tell me what your actual damages are then?
>
> A. I want to discuss that with my attorney at a later date. We have to discuss all that. I haven't talked with him yet.

(Ex. A at 38). Based on plaintiff's testimony, defendants argue his claim is statutorily barred, relying on Davis v. District of Columbia, 158 F.3d 1342 (D.C. Cir. 1998); Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997); Luong v. Hatt, 979 F. Supp. 481 (N.D. Tex. 1997); and Cain v. Com. of Virginia, 982 F. Supp. 1132 (E.D. Va. 1997), each of which resulted in dismissal of a

physical injury. Zehner and Luong involved claims of deliberate indifference under the Eighth Amendment. Cain involved a claim of malicious prosecution under the Fourth Amendment. Davis involved a claim of invasion of plaintiff's constitutional right to privacy.

Section 1997e(e) is a limitation on the damages which can be claimed by a prisoner in a federal civil action. See Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999). The prisoner cannot recover for mental or emotional injury without an accompanying physical injury regardless of what federal cause of action he or she advances. In this Court's judgment, the statute is not ambiguous as one court has found, see Mason v. Schriro, 45 F. Supp. 2d 709, 711 (W.D. Mo. 1999), nor is there any textual basis to conclude the statute does not apply to First Amendment claims as the Ninth Circuit has suggested. See Cannell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998).

This does not mean Royal is out of court. Royal alleges that he was placed in administrative segregation and transferred in retaliation for exercising his right of access to the courts to obtain a wheelchair. See Goff v. Burton, 91 F.3d 1188, 1191-92 (8th Cir. 1996). The right of access stems both from the First Amendment right to petition and the Fourteenth Amendment rights to due process and equal protection. Berdella v. Delo, 972 F.2d 204, 210 n.7 (8th Cir. 1992); see California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). Procedural due process and First Amendment guarantees particularly are among the "absolute" constitutional rights the violation of which may permit an award of nominal damages if no actual injury is shown. See Memphis Comm. Sch. Dist. v. Stachura, 477 U.S. 299, 308 n.11 (1986); Carey v. Piphus, 435 U.S. 247, 266 (1978). "After Carey, federal courts have consistently awarded nominal damages for violations of

First Amendment rights." Allah v. Al-Hafeez, __ F.3d __, __, 2000 WL 1257271, *3 (3d Cir. Sept. 6, 2000); see Rowe v. Shake, 196 F.3d 778, 781 (7th Cir. 1999).

Section 1997e(e) deprives the physically uninjured Royal of any recovery for actual injury from mental or emotional distress, but does not bar a claim for other damages for the violation of his constitutional rights implicated in his retaliation claim. These include nominal damages and, potentially, punitive damages unrelated to emotional or mental distress. Allah, _ F.3d at _, 2000 WL 1257271, *4; see Rowe, 196 F.3d at 781-82; Davis, 158 F.3d at 1349; see also Craig v. Cohn, 80 F. Supp. 2d 944, 947 (N.D. Ind. 2000); McGrath v. Johnson, 67 F. Supp. 2d 499, 508 (E.D. Pa. 1999); Cassidy v. Ind. Dep't of Corrections, 59 F. Supp. 2d 787, 791-92 (S. D. Ind. 1999).

Plaintiff is only barred from recovering damages for mental or emotional injury, not from bringing his retaliation claim; therefore, the motion for summary judgment on this ground should be denied.

B. Retaliation

Prison officials "cannot impose a disciplinary sanction against a prisoner in retaliation for the prisoner's exercise of his constitutional right." Goff v. Burton, 7 F.3d 734, 738 (8th Cir. 1993), cert. denied, 512 U.S. 1209 (1994)(quoted in Cornell v. Woods, 69 F.3d 1383, 1389 (8th Cir. 1995)); see Rouse v. Benson, 193 F.3d 936, 940 (8th Cir. 1999); Cooper v. Schriro, 189 F.3d 781, 784 (8th Cir. 1999). Plaintiff must show that impermissible retaliation was "'the actual motivating factor for'" the retaliatory conduct alleged. Goff, 7 F.3d at 737 (quoting Murphy v. Missouri Dep't of Correction, 769 F.2d 502, 503 n.1 (8th Cir. 1985)). This is a "but for" causal standard. Goff, 91 F.3d at 1191. "'[I]f the discipline which the prisoner

claims to have been retaliatory was in fact imposed for an actual violation of prisoner rules or regulations, then the prisoner's claim that the discipline was retaliatory in nature must fail.'" Henderson v. Baird, 29 F.3d 464, 469 (8th Cir. 1994), cert. denied, 515 U.S. 1145 (1995)(quoting Goff, 7 F.3d at 738). Here it is not clear Royal was disciplined, but if he was, the discipline was expunged. As a consequence his administrative segregation was not punitive.

The summary judgment record demonstrates that plaintiff had filed a lawsuit concerning access to his wheelchair and prison authorities allowed him access just prior to a hearing on preliminary injunctive relief. Two weeks later, in spite of a recommendation that lock-up was not required as a consequence of the disciplinary report, defendant Reid directed Royal should be locked up. Once he was in segregation, there is a factual dispute as to who was responsible for continuation of Royal's status until he was transferred. Reid has explained he believed plaintiff was manipulating staff with respect to his medical situation. The explanation given on February 1, 1999, for Royal's extension in investigative segregation by the Institutional Classification Committee composed of the other defendants was "problems, problems, etc." (Def. Ex. E). Plaintiff's cellhouse and work reports were good for the months of December and January. Viewing the summary judgment record favorably to Royal, a reasonable fact finder could infer from the close temporal circumstances, the lack of a disciplinary reason for Royal's continuation in segregation, and the otherwise satisfactory reports of his behavior that Royal's partially successful litigation activity was a factor in his segregation and subsequent transfer. Whether plaintiff is able to satisfy the rigorous "but for" standard depends on an assessment of the credibility and weight of the testimony which cannot be

determined by summary judgment.[1]

C. Qualified Immunity

Plaintiff must demonstrate sufficient facts to support a finding that defendants' conduct violated a clearly established federal constitutional or statutory right. See McGruder v. Heagwood, 197 F.3d 918, 919 (8th Cir. 1999); Lambert v. City of Dumas, 187 F.3d 931, 935 (8th Cir. 1999). The law regarding retaliation is clearly established in this circuit. Cornell, 69 F.3d at 1389; Goff, 7 F.3d at 738; Sprouse v. Babcock, 870 F.2d 450 (8th Cir. 1989). In arguing qualified immunity, defendants rely solely on their claimed lack of a retaliatory motive. This causal element of the retaliation claim is a predicate fact in determining qualified immunity about which there is a genuine issue for trial. See Hudson v. Norris, __ F.3d __, __, 2000 WL 1253323, *1, *5 (8th Cir. Sept. 6, 2000)(genuine dispute regarding "predicate facts material to the qualified immunity issue" preclude summary judgment); Hunter v. Namanny, 219 F.3d 825, 830 (8th Cir. 2000); Pace v. City of Des Moines, 201 F.3d 1050, 1053-54 (8th Cir. 2000).[2]

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[1] Defendants correctly point out that "[p]laintiff has no liberty interest in being placed in any particular prison or a specific place within a prison," invoking Sandin v. Conner, 515 U.S. 472 (1995), as a bar to plaintiff's claim. Memorandum in Support of Motion for Summary Judgement at 8. However, Sandin applies in the context of prison disciplinary due process claims, which plaintiff does not make here and does not preclude a claim for retaliatory discipline. See Human v. Rowley, 205 F. 3d 1346, 1999 WL 1204488, *1-2 (8th Cir. 1999) (Table case).

[2] Other than the fact they were on the Institutional Classification Committee which reviewed Royal's segregation status, the motion papers do not address the individual roles played by

(continued...)

Defendants' motion for summary judgment is denied. This matter remains set for evidentiary hearing on November 15, 2000.

IT IS SO ORDERED.

Dated this 11th day of October, 2000.

/s/ Ross A. Walters
ROSS A. WALTERS
Chief United States Magistrate Judge

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[2](...continued)
defendants Brandt and Clemens in the alleged retaliatory actions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Jeffery R. Royal,	)	
	)	4:98-CV-30495
Plaintiff,	)	
	)	
vs.	)	
	)	Findings of Fact,
Lowell Brandt, Carol	)	Conclusions of Law,
Clemens, and Tom Reid,	)	and Order for
	)	Judgment
Defendants.	)	

Plaintiff Jeffrey R. Royal, formerly an inmate at the Iowa Medical and Classification Center (IMCC) in Oakdale, Iowa, brought this lawsuit on September 30, 1998. Plaintiff originally brought claims for relief under 42 U.S.C. § 1983 and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, et seq. As a result of subsequent events, plaintiff dropped the ADA claim and was allowed to file an amended complaint under § 1983, in which he claimed he was retaliated against for exercising his right of access to the courts. The defendants are Lowell Brandt, former IMCC Treatment Director, retired prison staff member Carol Clemens, and former IMCC Security

Director Tom Reid.[1] Plaintiff seeks compensatory and punitive damages.

Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1343(a)(3), and 1343 (a)(4). The parties consented to proceed before a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) and the matter was referred to the undersigned on October 11, 2000. A ruling on defendants' motion for summary judgment was entered on October 11, 2000 (hereinafter "the summary judgment ruling") and the matter was set for evidentiary hearing. Defendants filed an interlocutory appeal on the qualified immunity issue. The appeal was later dismissed by defendants. Evidentiary hearing was held on March 6, 2002.

The Court has carefully considered the record evidence, the arguments and statements of counsel, and now finds and concludes as follows on the issues presented.

FINDINGS OF FACT

Other than the presence of a retaliatory motive, the facts are essentially undisputed.[2]

Royal was received into the custody of the Iowa Department of Corrections on August 10, 1998, following a theft conviction for "cattle rustling" as Royal described it. He initially was sent to IMCC and was assigned to the general population. Some months before his incarceration, Royal fell through a haymow and sustained a spinal cord injury. As a

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[1] Ms. Clemens' first name is spelled variously in the records as "Carol" and "Carole."

[2] Were it otherwise the credibility of Royal's testimony would be diminished by his criminal history and his lack of candor concerning claims he made in state court about suffering from cancer.

result, he was using a wheelchair when he first arrived at IMCC.

Royal had complaints about his medical care at IMCC and the accessibility of facilities. On September 10, 1998, he submitted a pro se complaint to this Court naming a number of defendants including the IMCC Security Director Tom Reid who, he alleged, had placed him in an inaccessible administrative segregation unit. The complaint was filed on September 30, 1998 following entry of an Initial Review Order. In the meantime, on September 25, 1998, Royal was transferred to the Medical Care Unit at the Iowa State Penitentiary (ISP) in Fort Madison, Iowa.

On October 16, 1998, Royal was returned to IMCC and shortly afterward was placed in the general population. An October 21, 1998, entry in his prison record noted that he "had been very manipulative regarding his alleged health care problems." (Ex. 5 at 1).

Upon Royal's return to IMCC, Doctor Loeffelholz, the IMCC Medical Director, decided Royal did not need his wheelchair or the analgesics he had been taking. The wheelchair was taken from him. Royal thereafter had to ambulate using crutches. Royal complained loud and often about the loss of his wheelchair and having to use crutches. The crutches caused him pain and his hands tingled. Periodic exercises in the IMCC health service unit had been recommended, but the unit was far enough away from Royal's living area that it was difficult for him to get there and he was reluctant to go. Royal submitted some seventeen grievances between November 1998 and January 1999, most in an unsuccessful effort to recover his wheelchair. He routinely pursued his grievances through all of the available steps, to the warden and on to the Iowa Department of Corrections in Des Moines. He also often

verbally complained to various staff members.

On December 24, 1998, Royal filed a motion for a preliminary injunction to require defendants to return his wheelchair and send him to a neurologist. In an accompanying affidavit Royal stated that his leg brace had broken and that, without a wheelchair, he had had to crawl on the floor to move about the facility. (Ex. 13). The affidavit continued that when Reid became aware he had been crawling, Reid issued a memorandum that any inmate seen crawling would be subject to discipline. Reid testified he would not tolerate an inmate crawling on the floor.

Hearing on the preliminary injunction motion was scheduled, but in the interim, on January 12, 1999, plaintiff was seen by a neurosurgeon at the University of Iowa Hospitals and Clinics (UIHC) who advised against the use of crutches in order to reduce pressure on Royal's ulnar nerve. Prison officials then agreed to allow Royal to have a wheelchair. The hearing was canceled.

Shortly afterward, on January 28, 1999, Royal received a disciplinary report as a result of a confrontation with a nurse in the health services unit. Royal went to the unit to do his exercises, which required a spotter. He asked who was going to spot him. He was told by nurse Julie Jones that the identity of the spotter did not matter. Royal responded that if it was Jones, he was not going to exercise, and left. Jones promptly wrote Royal up for obstructive/disruptive conduct, verbal abuse and intimidation in violation of prison rules. Neither Jones nor the reviewing shift supervisor recommended summary segregation. (Ex. 6).

Security Director Reid quickly learned of the incident. He considered Royal to be a disruptive, manipulative inmate who was constantly pressuring the health care staff for

concessions. He saw Royal's comments to nurse Jones that day in the same vein. Reid testified the incident was the "straw that broke the camel's back." Reid ordered Royal into summary administrative segregation, "lockup" in prison vernacular. Reid candidly testified that the rule violations reported by nurse Jones were not serious and would not in themselves have merited summary segregation. Royal had been disciplined on several occasions, but was not regarded as a significant discipline problem. A few days before being locked up he had been rated as making an above average adjustment in his prison work, and by two out of three evaluators as making an "outstanding adjustment" in his living unit. (Ex. 10, 11).

The records have been destroyed, but it appears that following hearing by an administrative law judge Royal was found to have committed one or more of the rule violations alleged and was given two days of disciplinary detention. Royal appealed, and on February 4, 1999, the disciplinary action was dismissed by the warden and the disciplinary report expunged from his record for an unspecified "technical procedural error." (Ex. 16).

Royal was not, however, released from segregation. On February 1, 1999, defendants Reid and Clemens, as members of a segregation review committee, reviewed Royal's segregation status. Prison procedures provided for regular periodic reviews of inmates in segregation.[3] Royal testified, and Reid did not dispute, that in connection with the review of his status on February 1, 1999, Reid stated to the effect: "I have you where

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[3] The committee was referred to interchangeably in the record as the Institutional Classification Committee and the Segregation Review Committee.

I want you." Reid testified that if he made the comment he would have meant that segregation was the best place for Royal's management.

The committee determined Royal should remain in segregation as "disruptive." For reasons, the committee wrote that Royal was "very manipulative", was to be removed from the general population program, and that a disciplinary report was then pending. (Ex. 12 at 1). The original administrative segregation notice form was annotated to indicate Royal's segregation had been extended because of "problems, problems, etc." (Ex. 7). Reid was the moving force behind the committee's action. It is evident that Clemens, who was sitting in for Treatment Director Brandt and was unfamiliar with Royal, relied on Reid's recommendations.

The review committee reviewed Royal's status again on February 15, 1999. Reid and Clemens again comprised the committee. The committee continued Royal in segregation as "disruptive", and noted a transfer from the institution was being arranged subject to medical approval. (Ex. 12 at 2). Royal's segregation status came on for review one more time on March 15, 1999, defendants Reid and Brandt were members of this committee. The committee continued Royal in segregation pending receipt of a medical clearance for Royal's transfer expected later that week. (Id. at 3).

For the first week of his stay in segregation, Royal was held in a cell too small to accommodate his wheelchair. After about a week, he was transferred to a larger cell, but still not allowed to have his wheelchair. Segregation, as its name implies, was more restrictive than conditions in the general inmate population. Royal was confined to his cell except for the opportunity for an exercise period one hour per day five days per week. His privileges were, in general, more restricted.

On March 25, 1999, Royal was transferred back to the Medical Care Unit at ISP. He was paroled in December 1999 and discharged his sentence February 4, 2001.

DISCUSSION INCLUDING ADDITIONAL FINDINGS OF FACT

Preliminarily, Parts III(A) (physical injury requirement) and III(C) (qualified immunity) of the summary judgment ruling are incorporated herein by reference.

A. Retaliation

An act in retaliation for the exercise of a constitutional right is actionable under § 1983 even if it would have been proper if taken for a different reason. Madewell v. Roberts, 909 F.2d 1203, 1206 (8th Cir. 1990)(quoting Freeman v. Blair, 793 F.2d 166, 178 (8th Cir. 1986)); see Cody v. Weber, 253 F.3d 764, 771 (8th Cir. 2001); Goff v. Burton, 7 F.3d 734, 738 (8th Cir. 1993), cert. denied, 512 U.S. 1209 (1994). Among the constitutional protections retained by prison inmates is the First Amendment right "to petition for redress of grievances." Trobaugh v. Hall, 176 F.3d 1087, 1088 (8th Cir. 1999); Ward v. Dyke, 58 F.3d 271, 275 (6th Cir.), cert. denied, 516 U.S. 991 (1995). The right to petition includes the right of access to the courts (which also has Due Process and Equal Protection Clause roots) and to use a prison grievance system to complain about the conditions of confinement. See, e.g., Rouse v. Benson, 193 F.3d 936, 940-41 (8th Cir. 1999); Trobaugh, 176 F.3d at 1088; Ward, 58 F.3d at 275; see also Berdella v. Delo, 972 F.2d 204, 210 n.9 (8th Cir. 1992)(concerning source of the right of access to the courts). Prison officials may not, therefore, discipline,

transfer, segregate or otherwise mete out less favorable treatment in retaliation for an inmate's exercise of these rights. See Rouse, 193 F.3d at 940; Cooper v. Schriro, 189 F.3d 781, 784 (8th Cir. 1999); Goff, 7 F.3d at 738; Madewell, 909 F.2d at 1206; Sanders v. St. Louis County, 724 F.2d 665, 666 (8th Cir. 1983). Verbal, informal complaints outside of an administrative system set up for the redress of grievances have more uncertain protection under the First Amendment. See Bowman v. City of Middletown, 91 F. Supp. 2d 644, 664 (S.D.N.Y. 2000); Anderson v. Sundquist, 1 F. Supp. 2d 828, 833 (W.D. Tenn. 1998).[4] The nature and extent of constitutional protection in this regard is dependent on the circumstances.

An inmate plaintiff claiming retaliation has the heavy burden of demonstrating that retaliation for protected activity was "'the actual motivating factor for'" the challenged action. Goff, 7 F.3d at 737 (quoting Murphy v. Missouri Dep't of Correction, 769 F.2d 502, 503 n.1 (8th Cir. 1985)). This is a "but for" causal standard. Goff v. Burton, 91 F.3d 1188, 1191 (8th Cir. 1996).[5]

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[4] Beyond the First Amendment, an inmate has an Eighth Amendment right to medical care which would to a reasonable degree incorporate a right to request adequate medical care. See Estelle v. Gamble, 429 U.S. 97, 103 (1976).

[5] Claims of retaliatory discipline face an additional hurdle. "'[I]f the discipline which the prisoner claims to have been retaliatory was in fact imposed for an actual violation of prisoner rules or regulations, then the prisoner's claim that the discipline was retaliatory in nature must fail.'" Henderson v. Baird, 29 F.3d 464, 469 (8th Cir. 1994), cert. denied, 515 U.S. 1145 (1995)(quoting Goff, 7 F.3d at 738). The Court does not understand Royal to make a retaliatory discipline claim. The disciplinary (continued...)

As an initial observation the Court notes that the Amended Complaint and the Final Pretrial Order focus on Royal's lawsuit as the relevant protected activity, not his use of the prison grievance system. It is not possible to separate these two activities in the analysis, however, because the grievances led to the preliminary injunction motion and together form a course of protected activity directed at the same end.

It is clear from Reid's testimony that Royal was placed in segregation because of his complaints about his medical care. The administrative segregation records, written by Reid, indicate Royal was continued in administrative segregation as "disruptive." (See Ex. 12). Reid testified this was a catchall phrase which in Royal's case meant he was manipulative. Reid further testified, in substance, Royal was manipulative because he had threatened lawsuits, claimed injuries, took up staff time with medical issues, and was in "a running gun battle" with health services in his attempt to get what he wanted.[6] What Royal wanted since his return to IMCC in October 1998 was his wheelchair. Royal's "manipulation" consisted chiefly of his efforts to obtain a wheelchair through persistent complaints to prison staff, grievances, and ultimately court action.

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[5](...continued)
charges resulting from the comments to nurse Jones were not sufficiently serious for summary segregation and were eventually expunged for procedural error. Royal's segregation was not imposed for a rule violation.

[6] At trial Reid also suggested, somewhat inconsistently, that a "huge piece of the decision" to place Royal in administrative segregation was to protect him from falling as he complained had occurred. The testimony in this regard is a post-hoc rationale which the Court does not credit.

In his testimony, Reid minimized his knowledge, and the significance, of the wheelchair issue and Royal's grievances. He said the grievances played no role in his decision to segregate Royal and whether Royal had a wheelchair made no difference
to him. It is probably true that whether Royal had a wheelchair was not of much concern to Reid. IMCC is partly a medical facility and inmates in wheelchairs are common. The subject of Royal's complaints was not the irritant, it was his persistence in making them. That the January 28 incident was the "straw that broke the camel's back" means there was a history which motivated Reid. As a part of this history, Reid knew he had been sued (he had been involved in answering interrogatories), was aware of the dispute about Royal's wheelchair (in fact, Royal made him aware), knew that the wheelchair was central to the grievances and other complaints Royal had been voicing, and, though Reid does not admit it, the Court believes Reid knew Royal had finally obtained a wheelchair and that his litigation activity had been a factor in doing so. The Court also finds it difficult to credit Reid's testimony that Royal's many grievances were not part of the reason he viewed Royal as manipulative.

That Royal's medical complaints were the cause of his segregation is supported by the absence of any other legitimate reason to put Royal in lock-up. The testimony is that the January 28 incident with nurse Jones did not warrant segregation. Royal's prison record was generally a satisfactory one. Reid testified Royal was not seen as a disciplinary problem. Royal had just received good work and living unit evaluations. Royal's counselor, Howard Hinton, testified that while Royal talked to him and many others about his desire for a wheelchair and better medical care, he was polite when he did

so and his overall behavior was appropriate. Hinton did not think Royal was disruptive. Reid testified Royal was often pleasant and, apart from his medical issues, could be personable and easy to get along with. Reid decided to transfer Royal at or shortly after the time of his segregation, but it was rare to lock an inmate up pending transfer.

While Royal's overall history of complaints about his medical care was the cause of his segregation, whether Royal would not have been segregated but for the exercise of his First Amendment rights to submit grievances and seek relief in court presents a closer question. These activities were protected conduct, but the verbal complaints and threats to sue prison officials and medical staff, which also played a part in Reid's decision, were not. Upon careful consideration, the Court finds the preponderance of the evidence supports the conclusion that the grievances and lawsuit were a "but for" cause of Royal's placement in lock-up.

Reid testified generally about Royal's "running gun battle" with health services, and his efforts to wring concessions from prison staff. Prison records reflect Royal had been disciplined twice for rule violations related to medical issues. (Ex. 5 at 1, 2). However, when the grievances and lawsuit are put aside, Royal's attempts to manipulate the prison staff to get what he wanted were not that unusual in the prison environment as the testimony of Royal's counselor, Hinton, indicates. What was different in Royal's case was that he had pursued his complaints all the way through the prison grievance process multiple times, had sought a remedy in court through preliminary injunctive relief, and ultimately succeeded in getting what he wanted. When he continued to be demanding as the January 28 incident showed, Reid had had enough. Had Royal's efforts to obtain a wheelchair been confined to the kind

of griping and posturing common in prison, the Court doubts Royal would have been segregated.

Royal did not have a right to abuse the grievance process by making frivolous or repetitive grievances. Nor did he have the right to file frivolous lawsuits. See Rouse, 193 F.3d at 941; Ward, 58 F.3d at 274. The grievances themselves are not before the Court. While they were numerous, they apparently were not frivolous in seeking the return of Royal's wheelchair. There is no evidence the repetitiveness of the grievances interfered with prison administration. Royal's motion for a preliminary injunction would have been well founded had his wheelchair not been returned to him.[7]

At the close of evidence Royal moved to dismiss defendant Clemens, who it was shown had no personal knowledge of plaintiff and whose participation on the review committee was solely as designee for defendant Brandt when he was absent. The motion was granted on the record. The Court finds defendant Brandt likewise had no personal knowledge of plaintiff's grievance activities. He participated in only the final segregation review on March 15, 1999 prior to plaintiff's transfer out of IMCC. There is no evidence he harbored a retaliatory motive. Brandt, like Clemens, followed Reid's lead. Brandt is also entitled to judgment in his favor.

B. Damages

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[7] Royal does not complain about his subsequent transfer to ISP. Prison administrators enjoy wide latitude in transferring prisoners because of conduct which interferes with prison administration or staff morale. Ward, 58 F.3d at 274. There were also valid medical reasons to transfer Royal to the medical unit at ISP.

Royal sought damages for mental or emotional distress arising from defendants' retaliation. In the summary judgment ruling, the Court concluded that in the absence of an allegation or showing of physical injury as required by 42 U.S.C. § 1997e(e), Royal could not recover emotional distress damages, but could recover "nominal damages and, potentially, punitive damages unrelated to emotional or mental distress."[8] Summary Judgment Ruling at 9. See also Oliver v. Keller, 289 F. 3d 623, 629-30 (9th Cir. 2002); Searles v. Van Bebber, 251 F.3d 869, 879 (10th Cir. 2001), cert. denied, ___ S. Ct. ___, 2002 WL 1270653 (June 10, 2002). Royal did not sustain a physical injury. Accordingly, the effect of § 1997e(e) is to render any mental or emotional injury sustained by Royal as a consequence of his segregation of no monetary value. However, a deprivation of First Amendment rights may be vindicated by an award of nominal damages. When a First Amendment violation is

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[8] Counsel for plaintiff has directed the Court to a recent Fifth Circuit case concerning the PLRA damage limit, Oliver v. Scott, 276 F.3d 736 (5th Cir. 2002). In that case, a prison inmate brought a civil rights action challenging the prison's practice of permitting female correctional officers to monitor male inmates in showers and bathrooms. In a footnote, the Fifth Circuit noted that the PLRA damage limits had only been applied to Eighth Amendment cases so far, but declined to address the limitation as it found the prison's practices satisfied standards of Turner v. Safley, 482 U.S. 78 (1987) and O'Lone v. Shabazz, 482 U.S. 342 (1987). 276 F.3d at 747 n.20. The Fifth Circuit identified the issue as whether the PLRA could constitutionally "eliminate nominal and punitive damages for First Amendment and privacy violation," not whether emotional distress damages could be eliminated in such a case. In the summary judgment ruling and above this Court has held that nominal and punitive damages for First Amendment violations survive the PLRA. Summary Judgment Ruling at 8-9.

found, nominal damages are the rule. See Risdal v. Halford, 209 F.3d 1071, 1072 (8th Cir. 2000)(citing Farrar v. Hobby, 506 U.S. 103 (1992)).

Plaintiff also seeks punitive damages. In order to support an award of punitive damages, plaintiff must show that Reid's conduct was "motivated by evil motive or intent, or . . . involve[d] reckless or callous indifference to [plaintiff's] federally protected rights." Smith v. Wade, 461 U.S. 30, 56 (1983). See Trobaugh v. Hall, 176 F.3d 1087, 1089 (8th Cir. 1999)(trial court directed to reconsider punitive damages issue on remand where evidence showed defendant deliberately punished plaintiff for filing grievances in violation of First Amendment); Williams v. Brimeyer, 116 F.3d 351, 352-355 (8th Cir.1997)(punitive damages in the amount of $500 justified where defendant was party to prior lawsuit which held blanket ban of publication was unlawful); but see Coleman v. Rahija, 114 F.3d 778, 787 (8th Cir. 1997)(although defendant's conduct in unnecessarily delaying transfer of pregnant plaintiff to hospital in face of well-documented history of premature delivery was deliberate indifference justifying liability under the Eighth Amendment, it was not sufficiently egregious to warrant punitive damages); Cornell v. Woods, 69 F.3d 1383, 1391 (8th Cir. 1995)(although prison officials' conduct in transferring plaintiff because he exercised his First Amendment rights was "not to be commended," it "did not rise to a level of egregiousness sufficient to justify the imposition of punitive damages); Standley v. Chilhowee R-IV School Dist., 5 F.3d 319, 323 (8th Cir. 1993)(conduct which supported a finding that plaintiffs' First Amendment activities were a motivating factor in termination of their teaching contracts did not rise to the level

of "evil motive" or "reckless or callous indifference"). Although the Court has found that Reid's conduct was motivated in significant part by Royal's exercise of his First Amendment rights to grieve and litigate his medical complaints, as in Cornell and Standley, Reid's conduct is not shown to be the product of "evil motive" or "reckless or callous indifference." Reid was more frustrated than vindictive or indifferent to Royal's rights. He did not act with a deliberatively punitive intent but, as he saw it, to protect his staff by deterring further complaints from Royal until he could be transferred. See Coleman, 114 F.3d at 787 (focus of punitive damages inquiry is on the intent of the defendant). Reid has retired and there is no need to deter future violations on his part. The law on retaliation for exercise of a constitutional right is well-established in the prison context and the Court is not convinced the unusual circumstances here warrant punitive damages to deter others. Overall, Reid's conduct was not sufficiently egregious to warrant punitive damages.[9]

CONCLUSIONS OF LAW

1. Plaintiff has failed to prove any claim against defendants Brandt or Clemens and the claims against said defendants should dismissed in their entirety;

2. Plaintiff has proved defendant Reid violated his rights under the First Amendment to the U.S. Constitution in connection with his placement in administrative segregation and

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[9] Reid claims qualified immunity. The summary judgment ruling at 11-12 rejected this defense and an appeal on the subject was abandoned. No new evidence or argument has been presented which would warrant a finding of qualified immunity.

is entitled to nominal damages.

3. Defendant Reid has not established he is entitled to the defense of qualified immunity.

4. No punitive damages should be awarded.

ORDER FOR JUDGMENT

The Clerk shall enter judgment substantially as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of defendants Lowell Brandt and Carole Clemens and against plaintiff Jeffrey Royal and the complaint is dismissed as against said defendants;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment in the amount of One Dollar ($1.00) is entered against defendant Tom Reid and in favor of plaintiff Jeffrey Royal.

IT IS SO ORDERED.

Dated this 26th day of June, 2002.

/s/ Ross A. Walters
ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JEFFERY R. ROYAL, Plaintiff, vs. LOWELL BRANDT, CAROL CLEMENS, and TOM REID, Defendants.	)	4:98-CV-30495 RULING ON MOTION FOR AWARD OF ATTORNEY FEES AND COSTS

By application filed July 19, 2002, plaintiff has timely requested attorney fees in this prisoner case arising under 42 U.S.C. § 1983. The fees claimed are based on an award of money damages against defendant Reid for nominal damages in the amount of $1.00.

At issue are the constitutionality and application of the fee limitations of the Prison Litigation Reform Act (PLRA), codified at 42 U.S.C. § 1997e(d), including the fee caps. On July 19, 2002, plaintiff notified the Court of his intent to mount a constitutional challenge to the attorney fee cap. As required by 28 U.S.C. § 2403 the Court certified to the Attorney General for the United States that the constitutionality of an Act of Congress affecting the public interest had been drawn in

question. In response, the government has noted that the Eighth Circuit has previously upheld the constitutionality of 42 U.S.C. § 1997e(d) in Foulk v. Charrier, 262 F.3d 687 (8th Cir. 2001), and does not seek to intervene at this time. Plaintiff in his motion for attorney fees has conceded that Foulk is the controlling law of this circuit.

The statute in question provides as follows with respect to an award of attorney fees:

> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

42 U.S.C. § 1997e(d). The Eighth Circuit has joined the other circuits which have, albeit reluctantly, upheld the constitutionality of the PLRA's attorney fee caps. Foulk v. Charrier, 262 F.3d at 704 (and cases cited therein). A recent decision from the Eighth Circuit has continued to uphold the PLRA's attorney fee caps. See Robinson v. Hager, 292 F.3d 560, 563 n.2 (8th Cir. 2002). The Court, therefore, follows the Eighth Circuit's lead and holds the attorney fee provisions of the PLRA withstand constitutional scrutiny and should be applied in this case.

The total amount of attorney fees awarded under § 1997e turns on the amount of the judgment, limiting the total to 150% of the judgment. In this case, the monetary award is $1.00. Thus, the total attorney fee award permissible under the

statute is $1.50. See Foulk, 262 F.3d at 704.

Plaintiff also seeks the costs of this action and attaches a statement showing expenses for faxes, telephone and travel mileage in the total amount of $291.06. Those costs may be paid from the Attorney Fee Admission Fund of the Southern District
of Iowa.

Plaintiff's motion for attorney fees and costs granted. Defendant Reid shall pay plaintiff the total amount of $1.50 for his attorney fees. The Clerk of Court shall reimburse plaintiff's counsel costs in the amount of $291.06 from the Attorney Fee Admission Fund.

IT IS SO ORDERED.

Dated this 22nd day of August, 2002.

/s/ Ross A. Walters
ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE

APPENDIX D

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Jeffrey R. Royal, Plaintiff/Appellant, v. Walter Kautzky, Defendant, Lowell Brandt; Carole Clemens, Defendants/Appellees, Paul W. Loeffelholz; Rusty Rogerson; Chris Gesie, Head Nurse; Gabriele Ortiz, Doctor, IMCC; Larry Hardy, Head of Transportation, Defendants, Tom Reid, Head of Security, IMCC,	)	Appeal from the United States District Court for the Southern District of Iowa.

Defendant/Appellee,)
)
King, Captain, Unknown/)
Unnamed Defendants, John)
Does, guards, IMCC,)
)
Defendants.)

Submitted: December 18, 2003
Filed: July 15, 2004

Before LOKEN, Chief Judge, HEANEY and RILEY, Circuit Judges.

RILEY, Circuit Judge.

Jeffery Royal (Royal) brought a section 1983 prisoner suit against several Iowa Medical Classification Center (IMCC) employees, including Tom Reid (Reid), IMCC's head of security. After a trial, Royal obtained a judgment against Reid for $1.00, and was awarded attorney fees in the amount of $1.50. The district court expressly found "Royal did not sustain a physical injury." Consequently, the district court[1] denied mental or emotional damages, awarding only nominal damages, and further denied an award of punitive damages. We affirm.

I. BACKGROUND

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[1] By consent of the parties, the dispute was referred for final disposition to the Honorable Ross A. Walters, United States Magistrate Judge for the Southern District of Iowa. 28 U.S.C. § 636(c).

While an inmate at IMCC, an institution within the Iowa Department of Corrections, Royal made numerous complaints and grievances. Most of Royal's complaints followed unsuccessful requests for medical care to address a spinal cord injury. After Reid tired of Royal's behavior, Reid placed Royal in segregation for sixty days. Royal filed a section 1983 suit against the IMCC officials, including Reid, for retaliation against Royal's First Amendment rights and access to the courts. The defendants filed a motion for summary judgment, which the district court denied. In denying the motion for summary judgment, the district court determined the record contained no allegations and no evidence showing Royal sustained physical injury. Thus, the district court determined the Prison Litigation and Reform Act of 1995 (PLRA) limited Royal's damages to nominal damages. See 42 U.S.C. § 1997e(e).

Following an evidentiary hearing, the district court found Reid had unconstitutionally retaliated against Royal by placing him in segregation because Royal filed numerous grievances. Since Royal did not suffer physical injury, the district court assessed nominal damages of $1.00. The district court considered punitive damages, but decided against them after finding Reid did not act with evil motive or reckless indifference, but out of frustration and a desire to protect his staff from Royal's abuse. Because Reid had retired, the district court also found punitive damages would not deter future conduct. Applying the PLRA's limitation on attorney fees, the district court awarded attorney fees in the amount of $1.50 to Royal.

On appeal, Royal asserts three grounds for reversing the district court. First, Royal contends he is entitled to more than

nominal damages, even though he suffered no physical injury. Second, Royal contends the district court abused its discretion by failing to award punitive damages. Third, Royal attacks the constitutionality of the PLRA's limitation on attorney fees.

II. DISCUSSION

A. Standard of Review

We "review claims of constitutional error and issues of statutory construction de novo." Foulk v. Charrier, 262 F.3d 687, 703 (8th Cir. 2001). However, the district court's damages award, including the district court's decision to deny punitive damages, is reviewed for an abuse of discretion. Trobaugh v. Hall, 176 F.3d 1087, 1088-89 (8th Cir. 1999). We review the district court's factual findings for clear error. See Williams v. Brimeyer, 116 F.3d 351, 354 (8th Cir. 1997).

B. Compensatory Damages

The PLRA states "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). With commendable candor, Royal acknowledges he did not suffer physical injury, and does not challenge the district court's conclusion Royal suffered no physical injury as a result of Reid's actions. However, Royal contends the PLRA does not limit his damages simply because he did not suffer physical injury. Royal argues (1) the PLRA's limitation on damages does not apply to First Amendment violations, and (2) his claim for being improperly segregated does not involve mental or emotional injury, so the PLRA should not limit his damages.

We are not the first court to confront whether section 1997e(e) applies to First Amendment violations. Other courts have not agreed on a uniform interpretation of section 1997e(e). The majority of courts hold section 1997e(e)'s limitation on damages applies to all federal prisoner lawsuits. See, e.g., Thompson v. Carter, 284 F.3d 411, 416 (2d Cir. 2002) (concluding "[s]ection 1997e(e) applies to all federal civil actions including claims alleging constitutional violations"); Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001) (holding section 1997e(e) applies to First Amendment violations); Allah v. Al-Hafeez, 226 F.3d 247, 250-51 (3d Cir. 2000) (holding section 1997e(e) applies to First Amendment violations); Todd v. Graves, 217 F. Supp. 2d 958, 961 (S.D. Iowa 2002) (holding section 1997e(e) applies to Fourteenth Amendment suits). Some courts have charted a different course, excluding First and Fourteenth Amendment claims from section 1997e(e)'s reach. See, e.g., Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) (holding section 1997e(e) does not apply to First Amendment claims); Mason v. Schriro, 45 F. Supp. 2d 709, 719 (W.D. Mo. 1999) (holding section 1997e(e) does not apply to Fourteenth Amendment equal protection claims).

We join the majority, concluding Congress did not intend section 1997e(e) to limit recovery only to a select group of federal actions brought by prisoners. Instead, we read section 1997e(e) as limiting recovery for mental or emotional injury in all federal actions brought by prisoners. In reaching this conclusion, we cannot escape the unmistakably clear language Congress used: "No Federal civil action may be brought by a prisoner . . . for mental or emotional injury . . . without a prior showing of physical injury."

To read this statute to exempt First Amendment claims would require us to interpret "[n]o Federal civil action" to mean "[n]o Federal civil action [except for First Amendment violations]." If Congress desires such a reading of section 1997e(e), Congress can certainly say so. We cannot.

Royal's second argument is his claim does not involve mental or emotional injury, so the PLRA should not limit his recovery rights. Royal apparently contends other types of recovery are available to him. To the extent Royal argues nominal damages, punitive damages, and injunctive and declaratory relief are available to him, we agree. Congress did not intend section 1997e(e) to bar recovery for all forms of relief. See, e.g., Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986) (holding nominal damages should be granted for section 1983 claims when actual injury cannot be shown); Smith v. Wade, 461 U.S. 30, 56 (1983) (holding punitive damages are authorized for violations of constitutional rights); Hughes v. Lott, 350 F.3d 1157, 1162 (11th Cir. 2003) (holding section 1997e(e) does not preclude nominal damages); Thompson, 284 F.3d at 418 (holding section 1997e(e) does not preclude injunctive relief or nominal damages); Searles, 251 F.3d at 878-79 (holding section 1997e(e) does not preclude nominal damages); Davis v. Dist. of Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998) (stating section 1997e(e) does not preclude injunctive relief); Zehner v. Trigg, 133 F.3d 459, 462 (7th Cir. 1997) (same). Therefore, Royal was free to seek nominal damages, punitive damages, injunctive relief and a declaratory judgment. Congress is well within its authority to balance the interests and reasonably limit a prisoner's relief.

The district court awarded $1.00 in nominal damages to

Royal, and considered awarding punitive damages. Faithfully following the PLRA, the district court appropriately awarded Royal $1.00 in nominal damages for Royal's First Amendment violation. Royal may not recover some indescribable and indefinite damage allegedly arising from a violation of his constitutional rights. See, e.g., Stachura, 477 U.S. at 308 n.11 (stating "nominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury"); Carey v. Piphus, 435 U.S. 247, 267 (1978) (holding nominal damage award of $1.00 required for procedural due process violation); Risdal v. Halford, 209 F.3d 1071, 1073 (8th Cir. 2000) (holding court must award nominal damages in the amount of $1.00 for First Amendment violations).[2]

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[2] Besides the rejected compensatory damages claim for mental or emotional injury, we are uncertain as to what damages Royal seeks. Citing Trobaugh, Royal seemingly seeks damages for each day he wrongfully spent in segregation, a loss of liberty injury. In Trobaugh, a prisoner filed a section 1983 suit for being placed in segregation for exercising his First Amendment rights. Trobaugh, 176 F.3d at 1088. The district court found the prisoner's First Amendment rights had been violated, and awarded him $1.00 as nominal damages. Id. On appeal, our court concluded the district court's "compensatory damage award was patently insufficient to compensate [the prisoner] for the injury he suffered by being placed in segregation in retaliation for exercising his constitutional right." Id. at 1089. Remanding the case for a new damages award, the court stated an "appropriate amount . . . would be in the vicinity of $100 per day for each [day] spent in administrative segregation." Id. Trobaugh does not control Royal's case, because the Trobaugh court did not confront the PLRA's limitation on recovery in prisoner suits. The Trobaugh court also did not discuss what injury the $100 per day compensated. Nor did the court explain how it arrived at

(continued...)

C. Punitive Damages

A factfinder may assess punitive damages in a section 1983 action when a "defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Wade, 461 U.S. at 56. If a district court finds a defendant's conduct meets the threshold for awarding punitive damages, the court should then consider the two purposes of punitive damages: (1) punish willful or malicious conduct; and (2) deter future unlawful conduct. Coleman v. Rahija, 114 F.3d 778, 787 (8th Cir. 1997). An appellate court should not lightly reverse a district court's decision to award–or not to award–punitive damages in a section 1983 case. Because a district court's decision to award punitive damages involves "a discretionary moral judgment," we empower a district court with enough discretion to make its proper judgment call without fear of inappropriate appellate intervention. Id.; Taylor v. Howe, 280 F.3d 1210, 1212 (8th Cir. 2002) (holding district court's decision not to award punitive damages was not an abuse of discretion because "the Court's action [was not] so far out of bounds as to justify appellate intervention"). We reverse only when we are convinced the decision to award–or not to award–punitive damages constitutes an abuse of discretion.

(...continued)

$100 per day as an "appropriate" damage assessment. Finally, the Trobaugh court did not discuss whether the prisoner had been released from prison, which would have taken his case outside of section 1997e(e), had it even applied. Because the Trobaugh court was not limited by the PLRA, as we are in this case, we decline to extend the holding from Trobaugh to cover a damage award subject to the PLRA's limitations.

Coleman, 114 F.3d at 787-88.

Given the highly deferential standard of review, we find no reversible error for three reasons. First, the district court accurately stated and applied the appropriate legal standard on punitive damages. Second, the district court's factual findings were not clearly erroneous. As the factfinder, the district court found no "evil motive" or "reckless or callous indifference" in Reid's actions. Instead, the district court found Reid acted, in part, out of frustration and a concern to protect his staff from Royal's abuse. Third, the district court concluded the purposes behind punitive damages would not be advanced in this case. The district court noted Reid's retirement weighed against awarding punitive damages, because a punitive damages award would not deter Reid's future conduct. The district court also concluded punitive damages were unnecessary to deter others. This conclusion is buttressed by the district court finding Reid's conduct violated the First Amendment, of which every IMCC employee should be made aware.

Royal contends Trobaugh also controls the punitive damages issue. However, the court in Trobaugh did not hold the district court abused its discretion by not awarding punitive damages. Instead, the court held the district court abused its discretion by awarding only $1.00 for nominal damages. Trobaugh, 176 F.3d at 1088-89. Since the court reversed the district court on the nominal damages award and remanded for reconsideration, the court asked the district court to reconsider its decision not to award punitive damages. Id. at 1089. Indeed, the district court refused to award punitive damages upon remand. We conclude Trobaugh does not require us to reverse

the district court's decision not to award punitive damages.

Because the district court applied the correct legal standard, and exercised its discretion in denying punitive damages, we refuse to second-guess the district court's decision. We conclude the district court did not abuse its discretion in not awarding punitive damages to Royal.

D. Attorney Fees

The PLRA places the following limitation on awards of attorney fees:

> Whenever a monetary judgment is awarded in an action [brought by a prisoner in which attorney fees are authorized], a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney[] fees awarded against the defendant. If the award of attorney[] fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

42 U.S.C. § 1997e(d)(2). Although awkwardly worded, the PLRA allows an award of attorney fees for 150 percent of the damages award.

Royal contends the PLRA's attorney fees limitation violates his constitutional rights. Based on settled Eighth Circuit precedent, the district court rejected Royal's constitutional attack and awarded attorney fees in the amount of

$1.50 (i.e., 150 percent of the $1.00 monetary judgment).

On appeal, Royal recognizes Eighth Circuit precedent controls the issue of the constitutionality of the PLRA's attorney fee limitation. We agree. In Foulk, 262 F.3d at 704, our circuit joined other circuits in holding "the PLRA's attorney[] fees cap passes constitutional muster." See Robinson v. Hager, 292 F.3d 560, 563 n.2 (8th Cir. 2002) (following Foulk "because this circuit has already upheld the constitutionality of the PLRA, and because a panel cannot overturn another panel's decision"). In deciding the PLRA's attorney fee limitation was constitutional, our court recognized "we are not authorized to act as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. Moreover, our role is not to judge the wisdom, fairness, or logic of legislative choices." Foulk, 262 F.3d at 704 (quoting Walker v. Bain, 257 F.3d 660, 670 (6th Cir. 2001)).

Notwithstanding our circuit's binding decision upholding the PLRA's limitation on attorney fees, Royal wishes to await this panel's decision and seek en banc review to overrule Foulk. Agreeing with the district court's decision to limit attorney fees to 150 percent of the damages award, we affirm the district court's award of $1.50 in attorney fees.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment in Royal's favor, including its decision to award $1.00

in nominal damages and not to award punitive damages. We also affirm the district court's order limiting the attorney fees award to $1.50, or 150 percent of the damages award.

HEANEY, Circuit Judge, dissenting.

Based on court precedent, the language of the physical injury requirement, and the legislative history of the Prison Litigation Reform Act (PLRA), I disagree with the majority's holding that 42 U.S.C. § 1997e(e) bars compensatory damages for violations of the First Amendment, and therefore, respectfully dissent.

I. BACKGROUND

Jeff Royal was convicted of "cattle rustling" and sentenced on August 10, 1998, to a term of five years in the Iowa Department of Corrections system. Prior to his conviction, Royal fell through a haymow and suffered a spinal cord injury requiring him to use a wheelchair. Royal was initially sent to the Iowa Medical and Classification Center (IMCC) and assigned to the general population. Royal became dissatisfied with the medical treatment he received and filed a pro se complaint on September 10, 1998. His complaint included allegations that: 1) he could not turn his wheelchair in his cell; 2) he was unable to get to the toilet or shower; 3) he had blood in his catheter but no action was taken by medical staff because he did not have an elevated temperature; 4) he was transferred in a van that was not handicapped accessible, requiring him to fall to the floor before

pulling himself onto the van's seat; 5) he had to fall on the ground and pull himself up onto a shower chair in order to shower; 6) he had to lay on the floor after using the toilet to pull on his prison-issue jumpsuit, and his request to wear pants instead of a jumpsuit was denied; and 7) his requests for an enema were delayed - once for ten days and once for six days. Royal's request for the assistance of counsel was granted on September 29, 1998.

In October of 1998, the IMCC medical director decided that Royal did not need his analgesics and confiscated his wheelchair. Royal complained that the crutches he was expected to use caused him pain and tingling in his hands and that the health service unit was far away, making it difficult for him to show up for his periodic exercises. Between November 1998 and January 1999, Royal submitted seventeen grievances in attempt to regain his wheelchair. On December 24, 1998, Royal filed a preliminary injunction motion to get his wheelchair back. Accompanying the motion was an affidavit in which Royal stated that his leg brace had broken and, without his wheelchair, he had to crawl on the floor. Royal also asserted in the affidavit that when Tom Reid, the IMCC Security Director, was notified that Royal had to crawl on the floor, Reid issued a memorandum stating that any inmate seen crawling on the floor would be subject to discipline.

On January 12, 1999, prior to the preliminary injunction hearing, Royal had a consultation with a neurosurgeon at the University of Iowa Hospitals and Clinic. The doctor stated that the use of crutches was putting pressure on Royal's ulnar nerve and recommended that Royal's wheelchair be returned to him.

The prison authorities returned his wheelchair and the preliminary injunction hearing was cancelled.

On January 28, 1999, Royal was "written up" after a confrontation with a nurse in the health services unit. Shortly thereafter, Royal was removed from the general population and placed in summary administrative segregation or, "lock up." Prior to being placed in segregation, Royal had been rated as above average in adjusting to prison work and outstanding in adjusting to his living unit. He remained in segregation until March 25, 1999, when he was transferred to another facility. Royal was paroled in December 1999.

Royal brought this suit pursuant to 42 U.S.C. § 1983, alleging that he was retaliated against for exercising his right of access to the courts when he was placed in segregation for almost two months.[3] The magistrate judge agreed, holding that Royal was placed in segregation in retaliation for filing complaints in violation of his First Amendment rights. The magistrate judge, however, denied Royal's claims for both compensatory and punitive damages, awarding Royal $1.00 in nominal damages and his attorney $1.50 as 150% of the damages award. Royal now appeals the denial of compensatory and punitive damages and the limitation on attorney's fees.

II. PRISON LITIGATION REFORM ACT

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[3] This complaint was filed on July 27, 2000. Royal's amended complaint is a retaliation claim and dismisses his original complaints about his medical care.

The PLRA was enacted on April 26, 1996, as part of an extensive omnibus appropriations bill. Section 1997e(e) of the PLRA is entitled "Limitation on recovery" and states that "[n]o Federal civil action may be brought by a prisoner . . . for mental or emotional injury . . . without a prior showing of physical injury."42 U.S.C. § 1997e(e). The physical injury requirement of this provision has been litigated in almost every circuit, with extremely varying results. One of the key disputes is whether the physical injury requirement applies to constitutional claims in which physical injuries rarely occur, such as violations of the First and Fourteenth Amendments. The majority states in its opinion that the majority of circuits have held that § 1997e(e)'s limitation on damages applies to First Amendment claims. A review of the case law, however, reveals that courts in a majority of the circuits have either affirmatively held that § 1997e(e) does not apply to First Amendment claims, or have declined to apply the physical injury requirement to such claims.

In the first circuit court opinion to hold that § 1997e(e) does not apply to First Amendment claims regardless of the form of relief sought, the Ninth Circuit in Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998), held that "[t]he deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show." The Seventh Circuit agreed, holding that a "deprivation of First Amendment rights standing alone is a cognizable injury," therefore "[a] prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained." Rowe v. Shake, 196 F.3d 778, 781-82 (7th Cir. 1999). The Fifth and Sixth Circuits have both declined to apply § 1997e(e)

to First Amendment claims. See Oliver v. Scott, 276 F.3d 736, 747 n.20 (5th Cir. 2002) (applying the physical injury requirement to claims of cruel and unusual punishment under the Eighth Amendment, but declining to reach the issue in a First Amendment case); Williams v. Ollis, 230 F.3d 1361 (6th Cir. 2000) (unpublished table decision) (stating that the plaintiff's First Amendment claim was not precluded by § 1997e(e)). The First Circuit Court of Appeals has not addressed the application of § 1997e(e) to First Amendment claims, but a district court in Massachusetts held that § 1997e(e) does not apply to violations of abstract rights reasoning that "the harms proscribed by the First Amendment, Due Process, or Equal Protection are assaults on individual freedom and personal liberty, even on spiritual autonomy, and not on physical well-being." Shaheed-Muhammad v. Dipaolo, 138 F. Supp. 2d 99, 101 (D. Mass. 2001). Lastly, district courts in the Second Circuit have also held that § 1997e(e) does not apply to First Amendment claims. See Lipton v. County of Orange, 2004 WL 876051, at *16-*17 (S.D.N.Y. Apr. 14, 2004); Amaker v. Haponik, 1999 WL 76798, at *7-*8 (S.D.N.Y. Feb. 17, 1999); Birth v. Pepe, 1999 WL 684162, *2 (E.D.N.Y. July 21, 1999).[4]

Only three circuits have definitively held that the PLRA's

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[4] The majority cites to Thompson v. Carter, 284 F.3d 411 (2d Cir. 2002), and asserts that the Second Circuit has held that § 1997e(e) applies to First Amendment claims. Thompson, however, involved § 1997e(e)'s application to an Eighth Amendment claim, not a First Amendment claim. District courts in the Second Circuit, both before and after Thompson, have recognized that the two claims are distinct and have not applied § 1997e(e) to First Amendment claims such as the one before us.

physical injury requirement applies to constiutional claims. In Allah v. Al-Hafeez, 226 F.3d 247, 250 (3d Cir. 200[illegible] the Third Circuit asserted that § 1983 compensatory damages are governed by general tort-law compensation theory and the plain language of § 1997e(e) makes no distinction between different types of federal action. The Tenth Circuit in Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001), also held that "[t]he plain language of the statute does not permit alteration of its clear damages restrictions on the basis of the underlying rights being asserted," therefore "[t]he statute limits the remedies available, regardless of the rights asserted, if the only injuries are mental or emotional." The D.C. Circuit in Davis v. District of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998), also held that § 1997e(e) bars compensatory damages for First Amendment claims without physical injury.

Our court has yet to reach this issue. We are, however, faced with an intra-circuit split: two district courts have considered the applicability of § 1997e(e) to constitutional claims and have reached opposite results. In Mason v. Schriro, 45 F. Supp. 2d 709, 719 (W.D. Mo. 1999), the court held that § 1997e(e) did not prevent the plaintiff from recovering damages for violations of the Fourteenth Amendment because such actions are not brought for mental or emotional injury. The court in Todd v. Graves, 217 F. Supp. 2d 958, 961 (S.D. Iowa 2002), however, declined to follow Mason and held that § 1997e(e) barred recovery of compensatory damages for violations of Fourteenth Amendment rights.

Absent guidance from our circuit, I look to the statute itself to determine if it was intended to limit constitutional

claims. When interpreting a statute, a court should always begin with the plain meaning of the statute. Dowd v. United Steel

Workers of Am., Local No. 286, 253 F.3d 1093, 1099 (8th Cir. 2001). If the plain language of the statute is unambiguous, the judicial inquiry ends. Id. Courts interpreting the plain language of § 1997e(e), however, have reached differing results which leads me to the conclusion that the language is neither plain nor unambiguous.

Some courts read § 1997e(e) and focus on the language "*for* mental or emotional injury." These courts have generally held that § 1997e(e) does not apply to First Amendment claims reasoning that First Amendment claims are not claims *for* mental or emotional injury, but are *for* violations of intangible and invaluable rights whose deprivation is an injury in and of itself.

Other courts, however, focus on the statute's "*no* Federal civil action" language. They argue that the use of the word "no" shows Congress's intent that there not be any exceptions to the physical injury requirement. They reason that, in order to receive compensatory damages, the plaintiff must prove a compensable injury which, under general tort-law theory, is limited to physical or emotional injury. Therefore, if a claim does not allege a physical injury, as most First Amendment claims do not, yet seeks compensatory damages, the plaintiff must be asserting a claim for mental or emotional damages which would be barred under § 1997e(e). One court, however,

focused on this same "plain language" yet reached the opposite result. Amaker, 1999 WL 76798, at *7. In that case, the district court held that § 1997e(e) does not apply to First Amendment claims reasoning that if the physical injury requirement applied to *all* federal civil suits the language "for mental or emotional injury" would be superfluous which is "contrary to the well-established principle that all words in a statute should be read to have meaning." Id. In other words, "[i]f Congress had intended to apply § 1997e(e)'s restriction to all federal civil suits by prisoners, it could easily have done so simply by dropping the qualifying language 'for mental or emotional injury.'" Id.

Although many courts, and the majority in this case, have found that the language of § 1997e(e) is "unmistakably clear" (ante at 5), based on the current circuit split as to whether § 1997e(e) applies to First Amendment claims, I disagree. Accordingly, because the plain language of the statute is ambiguous, I believe we must consider "the purpose, the subject matter and the condition of affairs which led to its enactment." United States v. McAllister, 225 F.3d 982, 986 (8th Cir. 2000) (internal quotation marks omitted). Furthermore, "[w]hen the meaning of a statute is questionable, it should be given a sensible construction and construed to effectuate the underlying purpose of the law." Id.

The legislative history of the PLRA shows a clear legislative intent to decrease the number of frivolous lawsuits filed by inmates. There is nothing in the legislative history of § 1997e(e), however, to suggest that Congress's intent was to prevent legitimate constitutional claims simply because the

prisoner suffered no physical injury.[5] Although the bill was called "far-reaching," the Senate focused almost exclusively on limiting "non-meritorious" and "frivolous" inmate litigation, while assuring that the legislation would not prevent legitimate claims and would actually "help protect convicted criminals' constitutional rights." 141 Cong. Rec. S14317 (1995) (statement of Sen. Abraham). According to Senator Hatch, the PLRA was intended to "help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits . . . and will ensure that Federal court orders are limited to remedying actual violations of prisoners' rights." 141 Cong. Rec. S14418 (1995). The Senators repeatedly stated that legitimate constitutional claims would not be prevented. Instead, the legislation was aimed at prisoners who "file free lawsuits in response to almost any perceived slight or inconvenience." Id. (statement of Sen. Kyl). Examples of such frivolous lawsuits presented by the Senators included: inadequate locker space; a bad haircut given by a prison barber; the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee; being

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[5] To be fair, there is almost nothing in the legislative history as to § 1997e(e) at all. According to one scholar, "[n]o aspect of the PLRA received less congressional deliberation than § 1997e(e)." James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly" Equal Protection Analysis*, 37 Harv. J. on Legis. 105, 114 (2000); see also Zehner v. Trigg, 952 F. Supp. 1318, 1325 (S.D. Ind. 1997) ("The legislative history contains virtually no discussion specifically concerning . . . § 1997e(e)."), Benjamin v. Jacobson, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) ("[I]t is worth noting that some believe that [the PLRA] which has a far-reaching effect on prison conditions and prisoners' rights deserved to have been the subject of significant debate. It was not. A single Senate hearing before the Judiciary Committee, one substantive House Report, and some floor debate is all we can find.").

served chunky instead of creamy peanut butter; being denied the use of a Gameboy video game; being issued shoes that were a quarter size too big; being served "hacked up" cake for dessert; prison officials throwing out an inmate's belongings after he escaped; and being denied dental floss.

There is a clear difference between the types of claims listed by Congress and historically actionable and meritorious claims under the First and Fourteenth Amendments. When a plaintiff files suit for a violation of his First Amendment rights, his claim is based on a deprivation of an intangible right. Whether his claim is valid is not linked to the existence or severity of his mental or emotional anguish. Certainly First Amendment violations can result in mental or emotional injury, and perhaps even physical injury, but § 1983 claims for First Amendment violations are not brought to redress such injuries. They are brought to redress the actual violation of the right. This is supported by the purpose behind the First Amendment. The First Amendment "is not concerned with preventing physical abuse by government agents, but rather with the invasion of the 'sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" Shaheed-Muhammad, 138 F.Supp at 108 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)). In addition, First Amendment violations occur at the time of the deprivation, not at a later time when the physical or emotional harm manifests. First Amendment rights "are abridged the moment a state silences free speech or prevents a citizen from following the precepts of his religion. While the violation may be accompanied by psychological or even physical injury, the severity of incursion is not necessarily

measured in those terms." Id. at 101.

The PLRA has many provisions other than § 1997e(e) which serve to prevent frivolous lawsuits, including frivolous First Amendment suits. The PLRA: 1) requires prisoner-plaintiffs to exhaust all administrative remedies before filing § 1983 actions; 2) requires prisoner-plaintiffs pay the initial filing fee or make monthly installment payments from their personal accounts when bringing suits in forma pauperis (IFP); 3) makes it easier for judges to dismiss malicious or frivolous suits; 4) prohibits a prisoner from filing a suit IFP after having three previous suits dismissed as frivolous, malicious, or failing to state a claim; and 5) allows judges to revoke an inmate's good time credit as a sanction for filing a malicious claim, filing a claim solely to harass the defendant, testifying falsely, or presenting false evidence. All of these provisions serve Congress's intent of decreasing frivolous lawsuits without effecting the ability of prisoners to vindicate there legitimate constitutional claims. Royal's ability to withstand all of these hurdles is further proof that his claim was not frivolous and was not they type of claim Congress intended to thwart.

III. CONCLUSION

Royal's claim is not frivolous. As found by the magistrate judge, Royal's First Amendment rights were violated when he was placed in segregation in retaliation for exercising his constitutional rights. Based on the language of § 1997e(e), the "purpose, subject matter and the condition of affairs which

led to its enactment," and the other significant provisions of the PLRA which serve to put a stop to frivolous prisoner litigation, I would find that Royal's claim for compensatory damages is not barred by § 1997e(e) of the PLRA.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Jeffrey R. Royal,	)	
	)	No. 02-3446
Appellant,	)	
	)	
vs.	)	Order Denying Petition for Rehearing and for Rehearing En Banc
	)	
Lowell Brandt, et al.,	)	
	)	
Appellees.	)	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

September 14, 2004

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Jeffrey R. Royal,	)	
	)	No. 02-3446
Appellant,	)	
	)	
vs.	)	Appeal from the United
	)	Court for the Southern
	)	District of Iowa
Lowell Brandt, et al.,	)	
	)	
Appellees.	)	

On the court's own motion, the order of September 14, 2004, denying the petition for rehearing en banc is hereby vacated.

September 20, 2004

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Jeffrey R. Royal,	)	
	)	No. 02-3446
Appellant,	)	
	)	
vs.	)	Order Denying Petition
	)	for Rehearing and for
	)	Rehearing En Banc
Lowell Brandt, et al.,	)	
	)	
Appellees.	)	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Morris S. Arnold, Judge Murphy, and Judge Bye would grant the petition for rehearing en banc.
(5128-010199)

October 15, 2004

Order Entered at the Direction of the Court

Clerk, U.S. Court of Appeals, Eighth Circuit